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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 576

JOHN J. FAHEY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on August 13, 1969.

CITATIONS TO OPINIONS BELOW

The opinion of the District Judge, who heard this case without a jury, is unreported and is printed in Appendix B herein. The opinion of the Court of

Appeals has not yet been reported and is printed in Appendix C herein.

JURISDICTION

The opinion of the Court of Appeals was entered on June 6, 1969, and after a petition for rehearing, the court entered its judgment and order denying the same on August 13, 1969. The jurisdiction of this court is invoked under 26 U.S.C. § 7203 and 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. In a criminal prosecution for wilful failure to file an income tax return, is an intention to defraud a necessary element of the offense?

2. In a criminal case where proof of wilfulness is required, is it sufficient to prove intent to establish that the action was taken "without grounds for believing that one's act is lawful or without reasonable cause or capriciously or with a careless disregard whether one has the right so to act"?

STATUTE INVOLVED

The statutory provision involved is 26 U.S.C. § 7203.

STATEMENT

Petitioner was prosecuted for wilful failure to file income tax returns in violation of 26 U.S.C. § 7203. The case was tried without a jury and the court made

findings of fact and filed an opinion which is contained in Appendix B herein. It was stipulated that petitioner failed to file the returns in question and other returns, even after investigation and prosecution for this offense was commenced. The court found, on the basis of an eminent psychiatrist's testimony, that petitioner had emotional and psychological problems. The psychiatrist testified, without contradiction, that during the period in question petitioner had (1) anxiety neurosis, (2) a compulsive neurosis and (3) an urge to self-destruction, and that this abnormality in his psyche substantially affected his capacity to control his conduct in relation to his tax returns (TR 100-104) and that his failure to file was substantially beyond his control. (TR 126.)

Other witnesses, both Government and defense, testified that at the times in question it would have been impossible to file accurate returns because of the inadequacies of petitioner's records. Petitioner's tax returns were accepted when filed and no civil fraud penalties were assessed. At the conclusion of the trial, the court stated that he did not believe that petitioner had an intent to defraud and posed the question as to whether or not the defense described in Section 7203 was of the traffic offense class.[1] After briefing, he determined that it was and found petitioner guilty despite the failure of the Government to prove an

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[1] ". . . Of course, you know there are many offenses where just the simple doing of an act which is prohibited by law is sufficient to convict. Your traffic offense is one. You are caught speeding. It doesn't make any difference whether you intended to break the law or not; just the simple doing of the act is enough.

Now I have a question: Is this one of that class of cases? . . ." (TR 146).

intention to defraud. Appeal was taken to the Court of Appeals for the Ninth Circuit and this court affirmed, holding that wilful intent exists in a "mere failure to file a tax return". Both the District Court and the Court of Appeals indicated in their opinions that their interpretation of the law was contrary to the Third and Fifth Circuits.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit rule established in this case, rejecting a requirement in Section 7203, Prosecutions, of an "intention to defraud", is contrary to the decisions of the Third and Fifth Circuits, as both the District Court and the Court of Appeals conceded. *Haner v. United States,* 315 Fed. 2d 792 (5th Cir.) (1963), *United States v. Vitiello,* 363 Fed. 2d 240 (3rd Cir.) (1966), *United States v. Palermo,* 259 Fed. 2d 872 (3rd Cir.). Here, a guilty finding and a year's jail sentence was imposed for "mere failure to file a tax return" on the basis that failure to file a tax return was the same class offense as a traffic ticket. Under the Ninth Circuit rule, the only intention required is a knowing intention to fail to perform a statutory duty. Sickness, mental or physical, misinterpretation of the law, insufficient education or intelligence to comply with the law's full requirements, or any other reason, will not stop conviction.

Uniformity of decision with respect to this statute is required. Failure to file forms a major share of the Justice Department's tax prosecutions. A different rule should not obtain for western taxpayers than

those accused without an intention to defraud in the east and south.[2]

2. The District Court utilized the standard of wilfulness which at least at one time was used as a standard Justice Department instruction in tax prosecutions. This standard was based on language in *United States v. Murdock,* 290 U.S. 389, 394 (1933) and, as used here, reads as follows:

> "The word 'wilful' as used in [the misdemeanor] counts . . . that is, failure to make a tax return, means with a bad purpose or without grounds for believing that one's act is lawful or without reasonable cause, or capriciously or with a careless disregard whether one has the right so to act."

Its use has been disapproved in many circuits, (see *Haner v. United States,* 315 Fed. 2d 792, Fifth Circuit; *United States v. Vitiello,* 363 Fed. 2d 240, 17 AFTR 2d 1251, Third Circuit; *United States v. Palermo,* 259 Fed. 2d 872, Third Circuit; *United States v. Litman,* 246 Fed. 2d 206, Third Circuit; *United States v. Martel,* 199 Fed. 2d 670, Third Circuit; and *Edwards v. United States,* 321 Fed. 2d 325, Fifth Circuit), but after first disapproving and holding it to be plain error (see *Block v. United States,* 221 Fed. 2d 786), the Ninth Circuit has returned to sanctioning its use (*Sherwin v. United States,* 320 Fed. 2d 147,

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[2]We believe from personal experience before the Department of Justice that prior to this decision there was a policy of requiring proof of an intention to defraud before prosecution was authorized. However, respondent is more aware of the Justice Department's rules in this respect and might be able to enlighten the court. It would appear to us that the administrative problems which would be caused by adopting the Ninth Circuit rule might give the Justice Department some concern.

Ninth Circuit). We believe this use to be contrary to the Supreme Court's decision in *United States v. Murdock,* which in fact required a criminal intent and is in conflict with most of the other circuits around the country. Uniformity in law enforcement requires a decision by this court. The Supreme Court has never passed on this standard which, in our opinion, shifts the burden of proof to the defendant and in view of its continued use, we believe that it should.

3. The District Court, despite a finding of no intention to defraud, found petitioner guilty. Both the Trial Court and the Court of Appeals seemed to be influenced by the fact that petitioner was an attorney. Even a lawyer, however, can be sick. Even a lawyer can be so mentally ill he cannot control his actions. Even a lawyer is entitled to a correct standard on criminal intent—and he probably is in much more need of such standard than the ordinary defendant. Furthermore, of all the requirements of procedural due process, none is so basic or so important as the standard governing criminal intent—even for lawyers.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, September 4, 1969.

Respectfully submitted,

RICHARD H. FOSTER,

Counsel for Petitioner.

(Appendices A, B and C Follow)

Appendix A

STATUTE (26 U.S.C., Section 7203)

"Sec. 7203. *Willful Failure to File Return, Supply Information, or Pay Tax.*

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the cost of prosecution."

Appendix B

MEMORANDUM DECISION

The only issue in this case is whether the defendant's admitted failure to file timely tax returns for the years in question was "willful" within the meaning of 26 U.S.C. § 7203.

The Supreme Court has passed upon the meaning of that word, as used in the predecessor of this statute, in *United States v. Murdock,* 290 U.S. 389, 54 S. Ct. 223, 78 L.Ed. 381 (1933), and in *Spies v. U.S.,* 317 U.S. 492, 63 S. Ct. 364, 87 L.Ed. 418 (1943), suggesting that "willful" in the misdemeanor statute might mean something different from "willful" in the statute defining tax offenses which constitute felonies.

The Court of Appeals for this Circuit, in turn, interpreting the Supreme Court pronouncements, stated two distinct tests for "willfulness" in *Abdul v. U.S.,* 254 F. 2d 292 (9th Cir. 1958), cert. denied 364 U.S. 832, 81 S. Ct. 44, 5 L.Ed.2d 58 (1960), and again in *Martin v. U.S.,* 317 F. 2d 753 (9th Cir. 1963).

The Court notes that the decisions in this Circuit on this point have been criticized in other circuits (see *Haner v. U.S.,* 315 F. 2d 792 (5th Cir. 1963), and *U.S. v. Vitiello,* 363 F. 2d 240 (3rd Cir. 1966)). There is, perhaps, much to be said for the view that Congress would not have used the identical word in the misdemeanor and felony statutes if it had intended different tests to apply. This Court is, however, bound by the decisions in *Abdul* and *Martin.*

In *Abdul,* the Court approved an instruction which defined "willful" as, ". . . with a bad purpose or without grounds for believing that one's act is lawful or without reasonable cause, or capriciously or with a careless disregard whether one has the right so to act." 254 F. 2d at 294. The Government has failed to establish that the defendant intended to defraud the Government of tax revenues due it. Such is not a requisite element of the misdemeanor defined in Section 7203, however, and the Government has established beyond a reasonable doubt, that defendant's conduct was "willful", as defined in cases in this Circuit.

Accordingly, the Court has signed the findings of fact proposed by the Government, with appropriate modifications.

The Court considers that the testimony of the psychiatrist on behalf of the defendant is more germane to the problem of sentencing than to the issue of the defendant's guilt or innocence; and the Court will consider said testimony for that purpose.

Dated this 6th day of March, 1968.

William Beeks,
United States District Judge.

Appendix C

United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN J. FAHEY, *Defendant-Appellant.*	No. 23,210

[June 6, 1969]

Appeal from the United States District Court
for the Northern District of California

Before: BARNES and CARTER, Circuit Judges,
and KILKENNY, District Judge*

BARNES, Circuit Judge:

Appellant was charged with and found guilty of the wilful failure to file income tax returns (26 U.S.C. § 7203) for the years 1960, 1961 and 1962.

The sole issue on this appeal is the sufficiency of the evidence to establish his wilful intent. As appellant's counsel concedes, appellant "for some seven years . . . failed to file a tax return," although he was a practicing attorney, and although he had been warned as to the

*Hon. John F. Kilkenny, United States District Judge for the District of Oregon, sitting by designation.

effect of such failure in several of the years subsequent to 1962 by his own attorney. He had been told of the criminal sanctions imposed for a wilful failure to file, and knew the Internal Revenue Service was investigating his failure to file the returns for the years charged.

This, urges appellant's counsel, was "apparently a product of his emotional and psychological disturbances," and no wilfulness was involved.

We turn to the trial court's findings of fact 10, 11 and 12 (R.T. 33-34).[1]

The trial judge did not place in his findings that appellant had no intent to defraud the Government, although he so stated at the trial (R.T. 138). In his memorandum opinion of March 6, 1969, he ruled the Government "had failed to establish that the defend-

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[1]Finding 10. The Defendant was at all times material fully aware that the law contained criminal sanctions for the willful failure to file timely income tax returns.

Finding 11. Notwithstanding the existence of emotional and psychological problems which the Defendant had and which were likely attributable to personal domestic circumstances, together with time-consuming professional pressures, the Defendant was nonetheless sane throughout the period beginning 1960 and continuing to date. Further, the Defendant knew the difference between right and wrong and was particularly aware and informed of the criminal penalties in respect to the willful failure to file federal income tax returns.

Finding 12. The failure of the Defendant to timely file federal income tax returns for each of the years 1960, 1961 and 1962 was in each instance of omission a voluntary, deliberate, intentional and purposeful act on his part, and with bad purpose in that by his particular knowledge, professional training and experience, and by virtue of his previous experience in the filing of his personal income tax returns prior to 1960, the Defendant was aware that there were no reasonable or justifiable grounds for failure to timely file such tax returns.

ant intended to defraud the Government of tax revenues due it." (C.T. 36, lines 16-18)

Appellant suggests that without an intent to defraud the Government there can be no violation of the statute—no wilful intent exists in a mere failure to file a return.

We believe the contrary. Unlike some other circuits, we suggest that Congress intended to draw a distinction between an intent to *defraud* (which intent must be wilful), and a wilful intent to fail to *file*, which may or may not involve an intent to defraud. For example, one might honestly plan and intend to pay the tax revenues due his Government at some future time subsequent to the required filing date, and hence have no intent to defraud. If one intentionally fails to file a return (or keep records, or supply information) at the times required by law, with full knowledge he was required to do so (whether or not he can pay), would it not be an intentional act—not to defraud, but to file the required return? The Supreme Court has held it to be. *Sansone v. United States,* 380 U.S. 343 (1965).

> "This misdemeanor requires only wilfulness and the omission of the required act. . . .
>
> * * *
>
> "[T]he intent to report the income and pay the tax sometime in the future does not vitiate the wilfulness required by § 7203. . . . *Id.* at 354.

Certainly if the taxpayer's conduct was "voluntary, deliberate, intentional and purposeful, and with bad

purpose" (as the acts here were found to have been), the required intent existed.

The court below relied on our previous pronouncements in *Abdul v. United States,* 254 F.2d 292 (9th Cir. 1958), *cert. denied,* 364 U.S. 832 (1960), and *Martin v. United States,* 317 F.2d 753 (9th Cir. 1963).

The rule of *Abdul* is:

> "The word 'wilful' as used in [the misdemeanor] counts . . . that is, failure to make a tax return, means with a bad purpose or without grounds for believing that one's act is lawful or without reasonable cause, or capriciously or with a careless disregard whether one has the right so to act." *Id.* at 294.

It then points out the felony charge (failure to pay) requires an intent to *defraud* the Government.

This rule has been criticized by a divided court in *Haner v. United States,* 315 F.2d 792 (5th Cir. 1963) (*Cf.* the dissent at 795), and by another divided court in *United States v. Vitiello,* 363 F.2d 240 (3d Cir. 1966), following *United States v. Palermo,* 259 F.2d 872 (3d Cir. 1958).

But we affirmed our previous interpretation as expressed in *Abdul* in *Edwards v. United States,* 375 F.2d 862 (9th Cir. 1967), relying primarily on and quoting the language used in *United States v. Murdock,* 290 U.S. 389, 394 (1933). *Id.* at 864.

We recently again succinctly affirmed our previous position in *Eustis v. United States,* ..... F.2d ....., (No. 22809, March 21, 1969).

We think *Abdul* and the cases cited therein express the better rule, and we affirm the decision and judgment below.[2]

The trial judge quite properly and humanely considered the defendant's emotional problems in fixing punishment. That alone was the area in which such consideration was proper, in view of the uncontradicted content of the expert testimony introduced on the subject.

AFFIRMED.

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[2] "The word 'wilful' is a word of many meanings, depending on the context in which it is used." *Zimberg v. United States*, 142 F.2d 132, 137 (1st Cir. 1944); *United States v. Vitiello*, *supra* (dissent at 244); *Spies v. United States*, 317 U.S. 492, 497 (1943). For the difference between wilful commission (felony) and wilful omission (misdemeanor), see *Spies* at 499.

The trial court's determination is one of fact. *United States v. Johnson*, 386 F.2d 630 (3d Cir. 1967).

Ripperberger v. United States, 248 F.2d 944 (4th Cir. 1957).

United States v. Schipani, 362 F.2d 825 (2d Cir. 1966), *cert. denied*, 385 U.S. 934.

Cf. also United States v. Ostendorff, 371 F.2d 719 (4th Cir. 1967).

In the United States Court of Appeals
for the Ninth Circuit

John J. Fahey, *Appellant,* vs. United States of America, *Appellee.*	No. 23,210

ORDER

Before: BARNES and CARTER, Circuit Judges, and KILKENNY, District Judge

The panel as constituted in the above case has voted to deny and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

IT IS ORDERED that the petition for rehearing is hereby denied and the suggestion for a rehearing en banc is rejected.